

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL TRADE COMMISSION,

Plaintiff,

v.

AMAZON.COM, INC.,

Defendant.

CASE NO. C14-1038-JCC

ORDER DENYING DEFENDANT
AMAZON'S MOTION TO DISMISS

This matter comes before the Court on Defendant's motion to dismiss for failure to state a claim (Dkt. No. 7), Plaintiff's response (Dkt. No. 11), and Defendant's reply (Dkt. No. 12).

The parties raise several disputed legal issues, including: (1) what documents, if any, the Court may consider in reviewing the motion to dismiss, (2) whether the complaint attempts to assert a new legal standard, and (3) whether the complaint pleads facts sufficient to state a claim under Section 5 of the FTC Act, 15 U.S.C. § 45(n). The Court addresses each issue in turn.

Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby DENIES the motion for the reasons explained herein.

I. BACKGROUND

1 Defendant Amazon.com, Inc. (“Amazon”) operates an Appstore in which customers can
2 view and download apps to use on Android mobile devices or Kindle Fire tablets. Dkt. No. 1, p.
3 3. Apps take many forms, but include functions that allow users to read books, play games,
4 stream movies, check weather, and organize files. Dkt. No. 1, p. 3; Dkt. No. 7, p. 4. Apps may be
5 free or come at a cost to download and install. Dkt. No. 1, p. 4. Certain user activities within
6 some apps also come with monetary charges, starting at \$0.99. *Id.* These charges are known as
7 “in-app purchases.” *Id.*

8
9 Many apps geared towards children, and likely to be used by children, offer in-app
10 purchases. Dkt. No. 1, pp. 7–10. For example, a child may be prompted to use or acquire
11 seemingly-fictitious currency to advance his or her progress in a game, but in reality is making
12 an in-app purchase. *Id.* at 8–9. Amazon has received many complaints from adults who were
13 surprised to find themselves charged for in-app purchases made by children. *Id.*

14 The Federal Trade Commission (“FTC”) brings suit against Amazon, alleging that the
15 billing of parents and other account holders for in-app purchases incurred by children “without
16 having obtained the account holders’ express informed consent” is unlawful under Section 5 of
17 the FTC Act, 15 U.S.C. § 45(n). Dkt. No. 1, p. 11.

18
19 Amazon moves the Court to dismiss the case for failure to state a claim under Fed. R.
20 Civ. P. 12(b)(6). In support of its motion, Amazon argues, *inter alia*, that (1) the FTC’s use of
21 the phrase “express informed consent” attempts to create a new legal standard, and (2) because
22 in-app purchases were made by children with actual or apparent authority, the complaint fails to
23 satisfy the requirements of 15 U.S.C. § 45(n). Dkt. No. 7.

24
25 The Court turns first to the appropriate standard of review, including what documents
26 may be considered while undergoing that review.

II. MOTION TO DISMISS, MATERIALS CONSIDERED

A. Standard for Motion to Dismiss Under Fed. R. Civ. P 12(b)(6)

“To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A complaint has stated a claim “plausible on its face” when it “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The plaintiff is obligated to provide grounds for his entitlement to relief that amount to more than labels and conclusions or a formulaic recitation of the elements of a cause of action. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 545 (2007). “[T]he pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Iqbal*, 556 U.S. at 678.

As Amazon has not filed an answer to the complaint, its motion to dismiss for failure to state a claim is timely. Fed. R. Civ. P. 12(b).

B. Documents Incorporated in the Court’s Review

The parties dispute whether the Court may consider the documents attached to Amazon’s motion to dismiss. *See* Dkt. No. 7, pp. 7–8; Dkt. No. 11, pp. 19–20 (“This Court Should Not Consider the Exhibits to Amazon’s Motion”). The documents are as follows:

(A) Amazon’s terms and conditions of use;

(B) The Amazon Appstore conditions of use;

(C)(1) A screenshot depicting a children’s app called “Pet Shop Story,” and its description;

(C)(2) A screenshot depicting the “Pet Shop Story” app and its “Key Details” link;

1 (C)(3) A screenshot confirming a recent in-app purchase and showing a “Parental
2 Controls” button, and;

3 (D) Copies of customer complaints and Amazon’s responses.

4 Dkt. No. 7, pp. 31–85.

5 When ruling on a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a district court may
6 not typically consider evidence outside the pleadings without converting the motion into a Rule
7 56 motion for summary judgment. *U.S. v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). However,
8 documents that are “incorporated by reference” in the complaint or facts for which judicial notice
9 are taken may be considered without conversion into a Rule 56 motion. *Id.* (citing *Van Buskirk v.*
10 *CNN*, 284 F.2d 977, 908 (9th Cir. 2002)).

12 The doctrine of “incorporation by reference” has been articulated in various ways. Courts
13 typically require that a document be “referred to extensively” in the complaint or “form the
14 basis” of the complaint to be considered incorporated by reference. *Ritchie*, 342 F.3d at 908. An
15 insurance coverage plan “forms the basis” of a complaint based on coverage and a newspaper
16 article containing an allegedly defamatory statement “forms the basis” of the corresponding
17 defamation complaint. *Parrino v. FHIP, Inc.*, 146 F.3d 699, 705–06 (9th Cir. 1998) (insurance);
18 *Kniewel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) (citing *Horsley v. Feldt*, 304 F.3d 1125,
19 1135 (11th Cir. 2002)) (newspaper). Another route to incorporation exists “if the contents of the
20 document are alleged in a complaint, the document’s authenticity is not in question and there are
21 no disputed issues as to the document’s relevance . . .” *Coto Settlement v. Eisenberg*, 593 F.3d
22 1031, 1038 (9th Cir. 2010) (where a billing agreement was not explicitly referred to in the
23 complaint but necessary to the claim and its authenticity was not disputed, it was validly
24 considered on a motion to dismiss).

1 A court may also review materials on a motion to dismiss if they are the subject of
2 judicial notice. Judicial notice may be taken of factual matters that are either generally known or
3 “capable of accurate and ready determination by resort to sources whose accuracy cannot be
4 reasonably questioned.” *Ritchie*, 342 F.3d at 908–09; Fed. R. Evid. 201(b). Judicial notice should
5 be taken with reserve, however, as its function is to deprive a party of the opportunity to attack
6 opposing evidence through rebuttal and cross-examination. *Rivera v. Philip Morris, Inc.*, 395
7 F.3d 1142, 1151 (9th Cir. 2005).

8
9 Turning to the six attachments, the Court finds that only Attachments C(1), C(2), and D
10 are appropriate to consider in reviewing Amazon’s motion to dismiss.

11
12 1. Attachments A & B:

13 The FTC brings a single cause of action against Amazon: unfair billing practices.
14 Nowhere does its complaint reference either Amazon’s general terms and conditions of use or
15 those for its Appstore. *See generally* Dkt. No. 1. Only once does the complaint tangentially
16 mention Amazon’s terms and conditions: “Amazon’s stated policy is that all in-app charges are
17 final.” Dkt. No. 1, p. 10; Dkt. No. 7, p. 5. This language, vaguely acknowledging a “stated
18 policy,” does not mention terms or conditions of use. Rather, taken in context, this language is
19 focused on the customer service experience of requesting a refund. Dkt. No. 1, p. 10, ¶ 30. In
20 response to customer complaints, Amazon employees caution that “[a]s a standard policy,
21 Amazon Appstore purchases are not returnable.” Dkt. No. 7, pp. 72, 76 (Attachment D).¹ The
22 terms and conditions documents, therefore, neither “form the basis” of the complaint, nor are
23
24

25
26 ¹ In the five total complaints included in Attachment D, two customers were informed about this policy and one was told that the refund was a one-time courtesy. The remaining two customers were not apprised of the policy. *See* Dkt. No. 7, pp. 65–85.

1 referred to extensively in the complaint. By any definition, neither Attachment A or B has been
2 incorporated by reference.

3 Nor does the Court take judicial notice of Attachment A or B. This Court has previously
4 held that neither legal terms nor similar customer terms of use were “beyond reasonable
5 controversy” such that judicial notice was appropriate. *Goodman v. HTC America, Inc.*, 2012
6 WL 2412070, at *4 (W.D. Wash. June 26, 2012). Erring on the side of caution with respect to
7 judicial notice, the Court declines to do so. Neither Attachment A nor B will be considered in
8 reviewing Amazon’s motion to dismiss.
9

10 2. Attachments C(1)–(2)

11 The complaint thoroughly describes the process by which customers search for,
12 download, and use apps. Dkt. No. 1, pp. 4–8. Attachments C(1) and C(2) illustrate this customer
13 experience. Dkt. No. 7, pp. 58–61. Similar images are included in the complaint. Dkt. No. 1, pp.
14 5, 8. The Court finds Attachments C(1) and C(2) to have been incorporated by reference in the
15 complaint. The FTC does not object to the Court’s consideration of these documents. Dkt. No. 7,
16 p. 19, n. 8. Both Attachments C(1) and C(2) are considered in this review.
17

18 3. Attachment C(3)

19 Attachment C(3), which shows a “Parental Control” option on a purchase confirmation
20 screen, adds information to Attachments C(1)–(2) not referenced in the complaint. The complaint
21 never mentions parental control functions. *See generally* Dkt. No. 1. Attachment C(3), which
22 provides evidence of the existence of parental controls, was not incorporated by reference in the
23 complaint. Again, in an exercise of caution, the Court declines to take judicial notice of
24 Attachment C(3) and does not consider it in reviewing Amazon’s motion to dismiss.
25

26 4. Attachment D

1 The complaint quotes directly from customer complaints provided in Attachment D. Dkt.
2 No. 1, pp. 9–10. Furthermore, the dissatisfaction and confusion expressed by these customers
3 forms the basis of the FTC’s complaint: that parents were substantially harmed in a way not
4 reasonably foreseeable and for which countervailing benefits do not atone. 15 U.S.C. § 45(n).
5 The complaint also specifically mentions Amazon’s “stated policy is that all in-app charges are
6 final.” Dkt. No. 1, p. 10. Customer service representatives in Attachment D express this
7 sentiment.
8

9 To the extent that it relates to the materials in the complaint—meaning, to the extent that
10 it conveys the customer experience and expresses Amazon’s policy—the Court finds that
11 Attachment D is incorporated by reference into the complaint and considers it here. Attachment
12 D is quoted, referenced, and much of its contents form the basis of the FTC’s complaint.

13 The Court does not, however, rely on Attachment D to provide evidence of the existence
14 of parental control functions: as previously mentioned, such features appear nowhere in the
15 complaint. *See generally* Dkt.No 1; *see also infra* Part IV(B)(1).
16

17 **III. THE FTC DOES NOT PLEAD UNDER A NOVEL LEGAL STANDARD**

18 **A. Parties Dispute of “Express Informed Consent” v “Unauthorized”**

19 Towards the end of the complaint, under the heading for the single count alleged (“Unfair
20 Billing of In-App Charges”), the following language appears:

21 “In numerous instances, Defendant has billed parents and other Amazon account
22 holders for children’s activities in apps that are likely to be used by children
23 without having obtained the account holders’ express informed consent.”

24 Dkt. No. 1, p. 11 (emphasis added). Amazon argues that the phrase “express informed
25 consent” attempts to create a new legal standard. Dkt. No. 7, pp. 1–2, 8–10. Elsewhere
26 throughout the complaint, the FTC uses the words “unauthorized” or “consent” to discuss

1 customer confusion around in-app charges. Dkt. No. 1, ¶¶ 8, 15, 23, 27, 28, 29, 30. At no other
2 time does the complaint use the phrase “express informed consent.” Dkt. No. 1.

3 Amazon makes much of this word choice. Amazon argues that the FTC attempts to
4 “legislate by litigation,” and asks the Court to be “sensitive to the statutory context” in which a
5 member of the U.S. House of Representatives once cautioned against an “overzealous FTC.”
6 Dkt. No.7, pp. 1, 7. Amazon insists that to require express informed consent is “to hold Amazon
7 to a new and unjustified legal standard.” *Id.* at 8.

8
9 The FTC argues that the use of the phrase “express informed consent” is harmless. Dkt.
10 No. 11, pp. 14–15. The FTC indicates that “the allegation that Amazon billed without ‘express
11 informed consent’ is another way of stating that it billed consumers for ‘unauthorized’ charges.”
12 *Id.* at 14. The FTC further contends that the phrase “express informed consent” may legally be
13 used interchangeably with the concept of “authorization.” *Id.* at 15.

14 Amazon disputes this assessment, arguing that the terms have independent legal
15 meanings and the confusion of terms renders the complaint fundamentally flawed such that
16 dismissal is proper. Dkt. No. 12, p. 2.

17
18 **B. There is not a Meaningful Legal Difference Between the Terms**

19 Courts routinely use the terms “consent” and “authorization” interchangeably. *See, e.g.*
20 *FTC v. Willms*, 2011 WL 4103542, at *9 (W.D. Wash. Sept. 13, 2011) (using the words
21 interchangeably while discussing the FTC Act); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 719 (S.D.
22 Tex. 2008) (both words used throughout opinion regarding telemarketing practices); *FTC v.*
23 *Ideal Fin. Solutions, Inc.*, 2014 WL 2565688, at *5 (D. Nev. June 5, 2014) (quoting the FTC’s
24 complaint and using the two words interchangeably without comment).

25
26 While Amazon contends that the words represent different legal standards, it cites only

one unpublished judgment to support its claim. Dkt. No. 12, p. 2, n. 2 (citing *FTC v. Interbill and Wells*, slip op. No. CV-S-06-01644-JCM-PAL at *7 (D. Nev. 2009), *aff'd sub nom FTC v. Wells*, 385 F. App'x 712 (9th Cir. 2010). The *Interbill* judgment, however, does not define, let alone distinguish, the terms “authorization” and “express informed consent.” *See Interbill* at *7. Rather, while listing potential acts that would be construed as “reasonable investigation,” the court separately lists “confirming. . . customer authorizations” and “for transactions to which [the Telemarketing Sales Rule] applies, confirming. . . express informed consent.” *Id.* The Court is not persuaded by this single citation.

The phrase “express informed consent” does not represent a new legal standard. The primary—and more appropriate—inquiry is whether the complaint pleads sufficient facts to state a claim under Section 5 of the FTC Act. 15 U.S.C. § 45(n) contains no requirement of authorization or consent, but sets forth a three-part test for unlawful activity. The Court now addresses this three-part test.

IV. THE COMPLAINT STATES A PLAUSIBLE CLAIM UNDER 15 U.S.C. § 45

Section 5 FTC Act provides, in relevant part:

The Commission shall have no authority under this section . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition . . .

15 U.S.C. § 45(n) (emphasis added).

A. Substantial Injury

An act or practice may cause substantial injury either by doing “small harm to a large number of people, or if it raises a significant risk of concrete harm.” *F.T.C. v. Neovi, Inc.*, 604 F.3d 1150, 1157 (9th Cir. 2010). Consumer injury can occur in “a variety of ways.” *Id.* at 1156.

1 While courts should look to any deception on the part of businesses, “the absence of deceit is not
2 dispositive.” *Id.* Nor is actual knowledge on the part of the consumer a requirement to establish
3 substantial harm. *Id.*

4 Courts have repeatedly held that billing customers without permission causes injury for
5 the purposes of asserting a claim under Section 5 of the FTC Act. *See, e.g., Neovi*, 604 F.3d. at
6 1153; *FTC v. Ideal Fin. Solutions, Inc.*, 2014 WL 2565688, at *5 (D. Nev. June 5, 2014); *FTC v.*
7 *Commerce Planet, Inc.*, 878 F. Supp. 2d 1048, 1078 (C.D. Cal. 2012); *FTC v. Inc21.com Corp.*,
8 745 F. Supp. 2d 975, 1004 (N.D. Cal. 2010), *aff’d*, 475 F. App’x 106 (9th Cir. 2012); *FTC v.*
9 *Crescent Publ’g Group, Inc.*, 129 F. Supp. 2d 311, 322 (S.D.N.Y. 2001); *FTC v. J.K.*
10 *Publications, Inc.*, 99 F. Supp. 2d 1176, 1191–1192 (C.D. Cal. 2000); *FTC v. Willms*, 2011 WL
11 4103542, at *9 (W.D. Wash. Sept. 13, 2011); *FTC v. Kennedy*, 574 F. Supp. 2d 714, 719–720
12 (S.D. Tex. 2008).

13
14 Amazon contends that “the Complaint fail[s] to make a plausible showing that the in-app
15 purchases by children were unauthorized” and therefore “no showing of substantial injury is
16 possible.” Dkt. No. 7, p. 18. As discussed below, however, Amazon has neither demonstrated
17 that the in-app purchases were authorized, nor that authorization precludes the possibility of an
18 unfair billing practice under Section 5 of the FTC Act.

19
20 1. Authorization of In-App Purchases

21 Amazon argues that the disputed in-app purchases were authorized under agency
22 principles. Dkt. No. 7, pp. 13. According to Amazon, a child user possesses actual or apparent
23 authority to make in-app purchases on the account holder’s behalf. *Id.* The FTC argues that the
24 application of agency principles is inappropriate because “state-law principles do not constrain
25 the scope of the FTC Act.” Dkt. No. 11, p. 7. The FTC appears to conflate the relatively routine
26

1 use of general common law agency principles with the rarer, more discretionary use of state
2 statutes and state judicial opinions in interpreting the FTC Act.

3 Courts may, but need not, rely on state judicial opinions in addressing a claim under the
4 FTC Act. *See Neovi*, 604 F.3d at 1155–56; *Orkin Exterminating Co., Inc. v. FTC*, 849 F.2d 1354,
5 1363 (11th Cir. 1988). The very existence of the FTC indicates congressional intent that its
6 interpretations of 15 U.S.C. § 45 trump those provided by state law. *Orkin*, 849 F.2d at 1363
7 (“[Petitioner’s] suggestion that we should rely on these [state] cases overlooks the fact that it is
8 the Commission itself which is charged, by statute, with the duty of prescribing ‘interpretative
9 rules and general statements of policy with respect to . . . Section [5].’”). While the FTC devotes
10 considerable discussion urging the Court not to apply state law, it does not rebut the notion that
11 common law agency relationships may be considered in interpreting the FTC Act.
12

13 Amazon’s rationale for applying agency principles appears strained at first glance:
14 because Congress is “presumed to legislate against the background of the common law. . . there
15 is no indication that Congress intended Section 5 to trump common law agency principles.” Dkt.
16 No. 7, p. 12. Yet, courts often consider agency liability under the FTC Act. While common law
17 agency principles may be applied in interpreting liability under the FTC Act, courts generally
18 employ such principles to consider whether defendants, not consumers, possessed agent
19 authority. *FTC v. Stefanchik*, 559 F.3d 924, 930 (9th Cir. 2009); *Southwest Sunsites, Inc. v. FTC*,
20 785 F.2d 1431, 1438–39 (9th Cir. 1986); *Perma-Maid Co. v. F.T.C.*, 121 F.2d 282, 284 (6th Cir.
21 1941); *Standard Distributors v. Fed. Trade Comm’n*, 211 F.2d 7, 13 (2d Cir. 1954) (concurring
22 in part and dissenting in part) (“Unsuccessful efforts by the principal to prevent such
23 [misconduct] by agents will not put the principal beyond the reach of the Federal Trade
24 Commission Act.”).
25
26

1 In its effort to apply agency principles to consumers, Amazon relies on the Second
2 Circuit's opinion in *FTC v. Verity Intern., Ltd.*, 443 F.3d 48 (2d Cir. 2006). In *Verity*, the Second
3 Circuit considered whether, when affected consumers connected phone lines to their computers,
4 they provided apparent authority for the billing of charges to their phone line. *Id.* at 64. The
5 Second Circuit found no apparent authority. *Id.*

6 Courts rarely find apparent authority proper on the consumer side of an FTC Act suit.
7 The *Verity* opinion identifies only one such case, where extension of agency liability to
8 consumers was justified by both "entrustment of a payment mechanism and specific customs of
9 the aviation industry." *Verity*, 443 F.3d at 64 (emphasis added) (citing *Towers World Airways,*
10 *Inc. v. PHH Aviation Sys., Inc.*, 933 F.2d 174, 177 (2d Cir. 1991)). In *Towers World*, the Second
11 Circuit reasoned:
12

13 Under the parameters established by Congress, the inquiry into "unauthorized
14 use" properly focuses on whether the user acted as the cardholder's agent in
15 incurring the debt in dispute. A cardholder, as principal, can create express and
16 implied authority only through manifestations to the user of consent to the
17 particular transactions into which the user has entered.

18 *Towers World*, 933 F.2d 174, 177 (2d Cir. 1991).

19 Ultimately, considering an agency relationship between account holders and child users is
20 not appropriate at this time. The purpose of such an analysis would be to determine whether the
21 in-app purchases were authorized, which depends largely on the terms and conditions set forth in
22 Attachments A and B. The Court does not consider Attachments A and B in reviewing this
23 motion to dismiss. *See supra* Part II(B)(1). The Court notes that it is not inclined to extend
24 apparent authority to child users without more persuasive legal authority.

25 2. Authorization Does Not Necessary Preclude a Cause of Action under Section 5
26

1 Amazon argues, without providing legal authority, that “[t]o be unfair under Section 5,
2 the charges at issue must be *unauthorized*.” Dkt. No. 7, p. 1 (emphasis in original). Notably, the
3 words “authorized” and “consent” do not appear in the relevant text of Section 5 of the FTC Act.
4 *See* 15 U.S.C. § 45(n). Amazon’s own motion later states the law more accurately:
5 “[g]enerally. . . the cases that do not involve deception involve charges that consumers never
6 authorized at all. . .” *Id.* at 10. To demonstrate unfair billing practices likely requires a showing
7 of deception or a lack of authorization, but not necessarily.
8

9 Amazon has neither demonstrated that the in-app purchases were authorized, nor that
10 authorization precludes the possibility of an unfair billing practice under Section 5 of the FTC
11 Act.

12 The complaint alleges sufficient facts to state a plausible claim that Amazon customers
13 suffered substantial harm due to billing of in-app purchases by children. The legal and factual
14 questions regarding the authorization of these charges remain too tenuous and undeveloped to
15 warrant dismissal of the complaint under Fed. R. Civ. P. 12(b)(6).
16

17 **B. Reasonably Avoidable**

18 An injury is reasonably avoidable under Section 5 of the FTC Act if the consumer could
19 have made a “free and informed choice” to avoid it. *Neovi*, 604 F.3d at 1158. Amazon contends
20 that its customers could have mitigated damages either before an in-app purchase through
21 parental controls, or afterwards by pursuing a refund, and that the complaint thus fails to allege
22 sufficient facts that this harm was not reasonably avoidable. Dkt. No. 7, pp. 18–21.
23

24 1. Anticipatory Mitigation

25
26

1 Amazon argues that its customers have notice of in-app purchases and the opportunity to
2 block purchases with parental controls, and therefore the injuries to customers were reasonably
3 avoidable.

4 (a) Notice

5 The complaint acknowledges that users downloading apps subject to in-app purchases are
6 notified of the possibility of in-app purchases. Dkt. No. 1, p. 6. This warning about in-app
7 purchases occurs “below the fold,” meaning users have to scroll down the screen to see it. *Id.*
8 Attachment C(1), which the Court considers in reviewing the motion to dismiss, also includes the
9 description of a particular app (“Pet Shop Story”) and the existence of in-app purchasing. Dkt.
10 No. 7, pp. 16, 58–59.

12 This acknowledgment, however, does not mean Amazon customers made a free and
13 informed choice to submit themselves to the risk of in-app purchases. The complaint indicates
14 that these “below the fold” warnings were unable to be seen by customers without scrolling
15 down. Dkt. No. 1, p. 6. Only a year and a half after launching the Appstore did Amazon add an
16 additional warning in the form of a “Key Details” popup. *Id.* There remains a factual question as
17 to how well-informed customers were about which apps included in-app purchasing.

19 Furthermore, the complaint suggests not all users were aware of the in-app purchases
20 they were making. An initial “Charge Popup” is displayed the first time an in-app purchase takes
21 place, which a child can clear by clicking a button labeled “Get Item.” Dkt. No. 1, p. 6. And, the
22 complaint alleges, “[i]n many instances, once a user clears the Charge Popup, Amazon does not
23 request any further action before it bills the account holder for the corresponding in-app charge.”
24 *Id.* Until March 2012, the complaint alleges, Amazon did not require a password to be entered by
25 the account holder for an in-app purchase to go through. *Id.* at 7.

(b) Parental Controls

Amazon’s argument that parental controls provide a means to avoid in-app purchases is not validly considered on the motion to dismiss. The complaint makes no mention of parental controls. *See generally* Dkt. No. 1. Nor is Attachment C(3), showing a “Parental Controls” button, considered in the Court’s review.²

Though notice of in-app purchases and the possibility of parental controls may have enabled some customers to avoid in-app purchases, the facts presently before the Court do not suggest so much care and clarity as to warrant dismissal. The FTC has sufficiently alleged that the injury to Amazon customers was not reasonably avoidable.

2. Mitigation After In-App Purchases

Amazon next argues that the injury alleged was reasonably avoidable due to its customers’ ability to seek a refund. Dkt. No. 7, p. 20–21. However, the possibility of—or even issuance of—a refund does not foreclose an action under Section 5 of the FTC Act. *FTC v. Direct Benefits Grp., LLC*, 2013 WL 3771322, at *17 (M.D. Fla. July 18, 2013) (“the fact that many customers were able to—eventually—obtain refunds from Defendant[] does not render the injury avoidable”); *Neovi*, 604 F.3d at 1158 (“Regardless of whether a bank eventually restored consumers’ money, the consumer suffered unavoidable injuries that could not be fully mitigated.”).

The complaint acknowledges that many Amazon customers were issued refunds. Dkt. No. 1, p. 10; Dkt. No. 7, pp. 65–85. However, the complaint explains—and Attachment D confirms—that customers had to take multiple steps involving e-mails and web-pages with

² While Attachment D acknowledges parental controls, the Court does not consider this portion of Attachment D on a motion to dismiss. *See supra* Part II(B)(4).

1 mixed messages. Dkt. No. 1, p. 10. The facts may not be numerous, but it appears plausible that
2 many Amazon customers may not have known about in-app purchases, did not know a refund
3 was possible, or were dissuaded by the complexity of the process from seeking a refund. This is
4 sufficient to survive a motion to dismiss.

5 The complaint sets forth sufficient facts to state a plausible claim that the injury to
6 Amazon's customers was not reasonably avoidable under 15 U.S.C. § 45(n).

7 **C. Countervailing Benefits**

8
9 Finally, Amazon indicates that countervailing benefits outweigh any injury, warranting
10 dismissal of the complaint. Dkt. No. 7, pp. 21–23. Amazon identifies two countervailing
11 benefits: (1) the fact that “customers perceive [in-app purchases] as enhancing the app’s
12 operation. . . [and] want that enhancement immediately,” and (2) the overall interest in
13 innovation. *Id.* at 4, 21–23 (“Consumers benefit when innovators try different things, rather than
14 being required to anticipate all potential problems before they occur or employ a one-size-fits-all
15 solution.”).

16
17 The FTC does not address a balancing of these countervailing benefits in its complaint,
18 but merely alleges that they do not outweigh the injury to customers. Dkt. No. 1, p. 11.
19 Amazon’s point that this language is legally conclusory is well taken. The Court does not find
20 this alone, however, to justify dismissal under Fed. R. Civ. P. 12(b)(6). The complaint as a whole
21 alleges sufficient facts to depict the nature and extent of practices leading to alleged injury. The
22 practice associated with this injury—billing adults for unauthorized in-app purchases by
23 children—is considered both for the harm and the convenience it provides. The harm is
24 sufficiently addressed by the FTC and the convenience is cursorily explained by Amazon as
25 “enhancing the app’s operation.” Dkt. No. 7, p. 4.
26

1 The complaint alleges sufficient facts to render it plausible that customer injuries were
2 not outweighed by this vaguely articulated benefit.

3 **V. INJUNCTIVE RELIEF**

4 Amazon argues that injunctive relief is inappropriate because it took measures to improve
5 its in-app purchasing experience. Dkt. No. 7, p. 23. The complaint acknowledges those measures.
6 Whether or not the steps taken by Amazon since launching its Appstore have cured all related
7 unfair billing practices is a question of fact not properly resolved on a motion to dismiss. Even if
8 the unlawful practices have ceased, the Ninth Circuit has established that injunctive relief may
9 still be appropriate. *Fed. Trade Comm'n v. John Beck Amazing Profits LLC*, 888 F. Supp. 2d
10 1006, 1012 (C.D. Cal. 2012) (“[I]t is well-established that the court's power to grant such relief
11 survives discontinuance of the illegal conduct, and because the purpose is to prevent future
12 violations, injunctive relief is appropriate when there is a cognizable danger of recurrent
13 violation, something more than the mere possibility.”)³

14 The specific terms of an injunction would be more properly resolved if necessary at the
15 conclusion of litigation.

16
17
18 **VI. CONCLUSION**

19 Considering the complaint and the documents it incorporates by reference, the Court
20 finds that the FTC does not bring this suit under a new legal principle, and that it alleges
21 sufficient facts to create a plausible claim for relief under Section 5 of the FTC Act.

22 For the foregoing reasons, Defendant Amazon’s motion to dismiss (Dkt. No. 7) is
23 DENIED.
24

25
26 ³ Amazon quotes selectively from this opinion to argue that an injunctive relief is more difficult to obtain than legal precedent suggests.

DATED this 1st day of December 2014.

A handwritten signature in black ink, reading "John C. Coughenour", written over a horizontal line.

John C. Coughenour
UNITED STATES DISTRICT JUDGE